THE IMPORTANCE OF LEGAL HISTORY FOR MODERN LAWYERING

CHIEF JUSTICE RANDALL T. SHEPARD*

INTRODUCTION

For a profession that owes much to history, we American lawyers move all too easily through our daily work without much reference to the judgment, wisdom, and experience of those who went before us as leaders in the system of justice. This symposium is designed to record and examine some of the most interesting people and events in the history of Indiana's courts, its lawyers and its judges.

I. IGNORANCE OF LEGAL HISTORY HAS FEW EXCUSES

Our inattention to legal history is curious in many ways. First, lawyers as a group more often than not are people who studied social science as undergraduates. Indeed, the profession is full of people who majored in history during college. In the course of earning their degrees, they likely learned a great deal about the history of governments and wars, the history of social movements, and the history of commerce. They probably did not learn much, however, about the role of the legal profession or even the courts.[1] Law schools give their students a fair instruction in various substantive legal fields, but usually not a great deal about the history of legal institutions. There are precious few opportunities to learn it later.

Aside from what we picked up on our way to becoming lawyers, the whole profession operates in substantial part, one might say, on the basis of history. We use our basic legal education, which bears unmistakable resemblance to the common law catalogued by Sir William Blackstone, by acting like common law lawyers. "What have the courts said about the law in this field? Is there a case on the question my client has brought to me?" These are questions natural to a legal system based on the rule of precedent. It is very much a rule of history.

Of course, there are a few circles in which legal history thrives and produces regular writings. These subjects range from those of wide interest, like the evolution of tort doctrine, to true esoterica, like a piece concerning the evolution of Russian secured transaction law before 1917.[2] On a broader front, bar associations publish pieces about famous milestones[3] and about associations of

---

*. Chief Justice of Indiana. A.B., 1969, Princeton University; J.D., 1972, Yale Law School; LL.M., 1995, University of Virginia.

1. A leading exception to this rule is probably the widespread understanding of the role lawyers and judges played in desegregation of America's schools, beginning with *Brown v. Board of Education*, 347 U.S. 483 (1954).

2. Konstantin Osipov, *The Genesis of Russian Secured Transaction Law Before 1917*, 42 CLEV. ST. L. REV. 641 (1994).

3. James E. Farmer, *Women in the Law: A Centennial Legacy of Antoinette Daken Leach*, 7 RES GESTAE 106 (1993).

lawyers.[4]

There may be a stronger message about lawyers and history in the fact that you can count on lawyers as people who enjoy telling and hearing stories about the profession. Lawyers' lounges or vacant jury rooms in county courthouses are still places where counsel trade tales about cases and people. This is consistent with the common law tradition, in which judges, lawyers, and law students met in the English inns of court to debate cases and rules of law. Modern lawyers may be wanting in our formal study of legal history, but you can generally persuade a lawyer to tarry a moment at the courthouse to hear the end of a story about some famous case or clever advocate. It is that spirit which motivated the Indiana Supreme Court to invite collaboration with the *Indiana Law Review* to stage this symposium.

II. HISTORY OF SUBSTANTIVE LAW

During a period when so much is governed by statutes,[5] one is continually amazed at how much of our daily work involves the common law made by courts. As I remarked earlier, the common law, and the rules of precedent and stare decisis which accompany it, constitutes a system that looks backwards. Still, the common law has never been considered a static code.[6] It has always been understood that common law evolves over time to meet the demands of the day, in what Justice Brent E. Dickson has called: "the march of Indiana common law."[7]

The best advocates in this sort of legal environment are those who know that urging a court to move the law somewhere new is best undertaken when you know where the law has been. As Judge Robert Grant once said during a ceremony admitting new lawyers, "Never move a fence until you understand why it was built there in the first place."

The benefit of being so equipped is all too easy to overlook. In the late 1980s, the Indiana Supreme Court set for oral argument a civil case in which the

---

4. The Indiana State Bar Association, for example, celebrated its centennial year with a commemorative edition of *Res Gestae* about the history of the profession and the association. *See* RES GESTAE, Sept. 1996.

5. The "Niagara" of new statutes tells quite a story. The 1893 Indiana Legislature enacted 380 pages of new laws. Fifty years later, the 1943 legislature enacted 1070 pages of new laws. In 1993, it enacted 4919 pages of new laws. The executive branch does the same thing, of course. Fifty years ago there was no such thing as the Indiana Register. Last year the Indiana Register published 2639 pages of new, revised, or proposed regulations.

6. A student written work for this symposium discusses the Indiana common law reception statute, which incorporates the English common law as it existed in the year 1607 into the law of Indiana. IND. CODE § 1-1-2-1 (1993). I think it would be a fair statement that judges of this state and others assumed they should apply English common law made in years thereafter and that one regularly encounters debate about "what was the common law" during the course of modern litigation.

7. Morgan Drive Away, Inc. v. Brant, 489 N.E.2d 933, 934 (Ind. 1986).

trial court and the court of appeals had both issued similar rulings based on a line of common law decisions running from the 1880s forward. The appealing party wrote an excellent brief about the reasons for adopting a new rule. He argued with some persuasiveness that society had changed in the intervening century and that the goals of the law in this particular field could be best met by moving on to a new formulation.

His opponent rose with only a single argument: the rule is "X," and it means we win. He did not respond to the arguments for change, even after several questions from the bench. Exasperated, one of my colleagues threw him what I thought was a final life preserver: "What would you like us to do in this field, Mr. Jones?" "We'd like the court to follow the law." This answer did not serve the client well.[8]

We encounter topics which are susceptible to substantive evolution all the time. Habeas corpus is a good example of a common tool used every day in the nation's courts. It has an enormous history, and judges, even judges in high courts, are as capable as lawyers of litigating such cases without paying much attention to the substantive law of the matter.[9] Surely, it is plain that both lawyers and judges make better law for the future if they understand what the law has been.

III. HISTORY OF LEGAL INSTITUTIONS

If we lawyers tend to overlook the evolution of substantive law, then we can be downright unconscious about legal institutions and legal practice. Practices are all too often taken for granted, and we too often repeat rituals and sustain enterprises long after their reason for being has evaporated.

When our court recently considered whether to change Indiana's manner of citing cases, I decided it might be interesting to see when this method got its start. It certainly commenced before the infamous *Bluebook* issued by the Harvard, Yale, Columbia and Pennsylvania law reviews. A quick investigation revealed that the year of a decision, placed right after the name of parties, began appearing when the court acquired a new reporter of decisions in 1904. His name was George W. Self. It was probably a campaign promise, and it was a good one. We have been doing it that way ever since, even though the publishing world has turned upside down several times in the intervening generations.[10]

The same lesson may be learned on more important matters. The present

---

8. I remember wondering what the appellee's lawyer must have thought about why we were holding a hearing. If you have won below, and the state's highest court sets argument, the logical thing would be to imagine that one should be ready to *defend* the status quo rather than to take it for granted. (To the best of my recollection, the side with the argument for change prevailed.)

9. Clarke D. Forsythe, *The Historical Origins of Broad Federal Habeas Review Reconsidered*, 70 NOTRE DAME L. REV. 1079 (1995).

10. We are now following *The Bluebook*, like every jurisdiction save California, but the vote to change was close, three to two. IND. APP. R. 8.2(B).

fragmented structure of Indiana's trial courts apparently flows from a conclusion reached by someone in the 1880s that the Indiana Constitution permitted only one judge in each circuit court. Accordingly, the legislature created criminal courts, superior courts, probate courts, juvenile courts, and so on, even though it has been an article of faith in the American legal profession since 1908 that unified trial courts serve us best. Until recently, no one had seriously examined the validity of that 1880s conclusion. When the six-judge Monroe Circuit Court was created in 1990, we broke the myth that led to fragmented trial courts in our state. This was a point that could have used some earlier examination. In short, as Professor Calvin Woodard once said to a class, "We study history to free ourselves from it."

That has certainly been my experience in studying the nature of common law courts in England. As I mentioned earlier, the common law tradition was wholly an oral tradition in which judges and lawyers debated and refined points of law. The same tradition guided the appellate courts. These higher courts were places where counsel argued appeals from a list of authorities provided to the court in advance; the arguments went on for as long as the judges thought necessary, and then the judges announced a decision. This system was transplanted to the English colonies in America, and it largely prevailed in the colonial period and well on into the 19th century.[11]

Although the history of such appeals is illuminating, it is but a prelude to the fact that modern British appellate courts have retained this oral tradition. That is, appeals still occur without a transcript, without briefs, without formal time limits for argument, and without the judges issuing written opinions. It should be thought-provoking for modern American lawyers and judges, buried as we are under mounds of paper. It is an important lesson, one that starts as history and ends as comparative law.

The current debate about the nature of legal education, of course, owes a great deal to history. Law firms complain that new law graduates know something about substantive law but not very much about drafting documents or organizing client matters.[12] Law schools have heard these complaints, which have been flowing now for a decade or two, and they have made substantial provision for courses and clinical experiences in everything from drafting briefs to counseling clients. Many in the bar are still not satisfied and argue for less

---

11. For example, appellate judges in eighteenth and nineteenth century England delivered their decisions seriatim, with each member of the panel announcing his own reasons for voting a particular way. RICHARD A. POSNER, THE FEDERAL COURTS 227 n.7 (1985). This tradition gained some ground in early American practice, but it soon gave way to a system by which one member of the panel signed an opinion outlining the views of the majority. *Compare* Chisolm v. Georgia, 2 U.S. (1 Dall.) 419 (1793) (opinions delivered seriatim by each of the five Justices), *with* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (Marshall, C.J., writing for the Court).

12. The MacCrate Report, issued by the American Bar Association in 1992, was a major event in this debate. The debate still rages. *See generally Legal Education and Professional Development—An Educational Continuum*, 1992 A.B.A. SEC. ON LEGAL EDUC. AND ADMISSIONS TO BAR.

academics and more hands-on opportunities. Of course, this is exactly where legal education in the United States started out—with students "reading the law" in a lawyer's office to qualify for admission to the bar. Rejecting that manner of training as inadequate, the legal profession worked hard in the late nineteenth and early twentieth century to convert lawyering into an academic subject.[13] Although the debate over the proper balance in law schools curricula should continue, the contribution to this discussion by practitioners would be more constructive if more practitioners possessed broader knowledge about where the profession took legal education over the last 150 years.[14]

In short, we are likely to benefit from careful examination of historical ways of doing business. We are often timid about the reform of legal structures because we assume they stand on more hallowed ground than history demonstrates.

IV. THE HISTORY OF GREAT PEOPLE

Whenever I consider the contributions of people such as the three justices who have served on the Indiana Supreme Court for more than twenty-five years, I am reminded of the words musician Tom Lehrer used in praising the life's work of one of the world's greatest composers: "It is a sobering thought that when Mozart was my age he had been dead for three years."

It is not by accident that the walls of university buildings and public courthouses frequently display the names of great lawgivers. Such people are an inspiration to carry on.

Inevitably they give us many lessons. One is a lesson in determination and adaptability to change. Issac Blackford became a judge during the first year of statehood when our government fit nicely in the statehouse in Corydon, and he departed after the new constitution was written and the nation was preparing for a civil war. Roger O. DeBruler came to the court when Lyndon B. Johnson was President, and I was a college senior, and he stayed long enough to become one of the first members of the court to draft opinions using a computer. Richard M. Givan first became part of the court's life as a law clerk in 1951, and he stayed until his secretary, Jackie Anders, learned to put opinions on the computer. He once told me that he had in his lifetime known personally one-third of all the people who served on the Indiana Supreme Court.

These justices are worth remembering because we have had the good fortune to be their colleagues and friends. They are worth memorializing, however, for other reasons, the reasons for which their fellow citizens will remember them. Like so many other judges and like so many great lawyers, their fellow citizens will remember them for what they did for our society.

The history of the legal profession is one replete with landmarks in the

---

13. James P. White, Reflections on American Legal Education, Address for the St. John's University Distinguished Lecture Series 4-8 (May 1, 1985) (transcript on file with author).

14. Randall T. Shepard, *Classrooms, Clinics and Client Counseling*, 18 OHIO N.U. L. REV. 751 (1992).

advancement of American society. Lawyers and judges in this state and others led the fight against slavery in the last century and the fight against segregation in this century. Lawyers and judges opened up the democratic system by bringing cases like *Baker v. Carr*.[15] Our profession helped create modern prosperity in business and industry by developing reliable commercial rules and agreements, enforceable across state lines and even national boundaries. We created the tools with which modern America has made so much progress in cleaning up the environment. We are a major force in the protection of children and others unable to care for themselves.

In short, the profession's contributions to substantive law and America's institutions are worth memorializing, worth remembering, and worth praising. We owe it to the profession and to our fellow citizens to record the best of that story. This symposium is a splendid way to do that.

15. 369 U.S. 186 (1962).